

D.P.U. 94-102-1

Investigation by the Department on its own motion, pursuant to G.L. c. 164, §§ 76 and 94G, into the relationship between the Massachusetts Electric Company and the Massachusetts Bay Transportation Authority.

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ORDER ON APPEAL BY CAMBRIDGE ELECTRIC LIGHT COMPANY  
OF HEARING OFFICER RULING DENYING THE COMPANY'S  
PETITION  
FOR PARTY STATUS AND GRANTING THE COMPANY  
LIMITED PARTICIPANT STATUS

I. INTRODUCTION

On May 13, 1994, the Department of Public Utilities ("Department") issued an Order opening an investigation by the Department, on its own motion, pursuant to G.L. c. 164, §§ 76 and 94G, into the relationship between the Massachusetts Electric Company ("MECo") and the Massachusetts Bay Transportation Authority ("MBTA"). Massachusetts Electric Company, D.P.U. 94-102 (1994) ("D.P.U. 94-102").

On May 27, 1994, Cambridge Electric Light Company ("Cambridge"), pursuant to 220 C.M.R. § 1.03, filed with the Department a petition ("Petition") for leave to intervene in this proceeding as a party, with full appellate rights. On June 3, 1994, MECo and the MBTA, pursuant to 220 C.M.R. § 1.03, filed answers in opposition to the Cambridge petition. On June 9, 1994, Cambridge, pursuant to 220 C.M.R. § 1.03, filed a response to MECo's answer. On June 10, 1994, the Hearing Officer issued a ruling ("Ruling") that denied Cambridge's Petition for full party status in part and granted Cambridge limited participant status with the right to file a brief only.

On June 15, 1994, Cambridge, pursuant to 220 C.M.R. § 1.06(3), filed with the Department an appeal ("Appeal") of the Hearing Officer's Ruling. On June 20, 1994, the MBTA, pursuant to 220 C.M.R. § 1.06(6)(d)(3), filed with the Department a response ("Response") to Cambridge's appeal of the Hearing Officer's Ruling.

## II. HEARING OFFICER RULING

The Hearing Officer found that Cambridge was not substantially and specifically affected by this proceeding and that its interests would be sufficiently protected by granting it the right to file a brief only (Hearing Officer Ruling at 6). Accordingly, the Hearing Officer denied Cambridge's petition for leave to intervene as a full party, in part, and granted Cambridge limited participant status (id. at 7).

In making his ruling, the Hearing Officer found that Cambridge's interest in potentially precedential litigation does not equate with being substantially and specifically affected by its outcome (See Hearing Officer Ruling at 4, 6). In addition, the Hearing Officer noted that Cambridge did not seek the right to conduct discovery, to cross-examine witnesses, or to present witnesses and introduce evidence and did not explain how its participation would aid or enhance the Department's investigation (See Hearing Officer Ruling at 5, 6). Finally,

the Hearing Officer referenced specific points made by the MBTA regarding: (1) the failure of Cambridge to demonstrate how it is substantially and specifically affected by the outcome of the Department's investigation of the specific relationship between MECo and the MBTA, especially in light of the Department's admonition that it will not establish a general policy on stranded investment in this proceeding; and (2) the absence of any stranded cost charge in Cambridge's current rate for transmission service to the MBTA, where the rate was filed by Cambridge and approved by the United States Federal Energy Regulatory Commission ("FERC") (Hearing Officer Ruling at 6).

### III. POSITIONS OF THE PARTIES

#### A. Cambridge

In its appeal, Cambridge asserts that in denying Cambridge full party status, the Hearing Officer failed adequately to distinguish Cambridge from MECo and BECo, which are full parties to this proceeding and which had relationships with the MBTA similar to Cambridge's relationship as a power supplier to the MBTA (Appeal at 1). Cambridge concludes that the Hearing Officer improperly denied Cambridge's petition and that the Department should grant Cambridge

its requested full party status, with the limitations proposed by Cambridge (id.). Cambridge seeks the right to: (1) receive copies of all filings, pleadings, and submissions made throughout the course of the proceeding; (2) attend all conferences and hearings conducted in the proceeding; (3) file briefs in the course of the proceeding; and (4) seek judicial review of any final Department decision (id.).

Cambridge contends that it sits in a position common with MECo because, like MECo, Cambridge was a power supplier to the MBTA prior to the MBTA's decision to leave Cambridge's system as an electric service customer (Appeal at 3). Cambridge argues that the MBTA's unique status as a legislatively-created utility has had a similar effect on both Cambridge and MECo (id.). Cambridge states that while it has not sought to charge the MBTA for any stranded costs, any decision by the Department in this case likely will affect the development, content, and implementation of any stranded investment charge that Cambridge would seek to apply to the MBTA in the future (id. at 3-4). Even though Cambridge now provides transmission service to the MBTA under a FERC-approved tariff that does not contain a stranded cost charge, Cambridge contends that it is not precluded from seeking recovery of stranded costs from the MBTA in the future with a proper filing with the FERC or possibly the Department (id. at 4).

Cambridge argues that it has a substantial interest in this case beyond the Department's establishment of general policy (id.).

Cambridge asserts that it has a specific interest in how stranded costs are calculated related to electric service with the MBTA, and how an electric company should have considered the MBTA's domestic utility status in evaluating investment costs (id.). Accordingly, Cambridge concludes that it is substantially and specifically affected by the outcome of this proceeding (id.). By requesting full party status, including the right to seek judicial review of any final Department decision, while declining the opportunity to conduct discovery, conduct cross-examination, or introduce evidence, Cambridge seeks to protect its substantial interest in the outcome of the proceeding without causing undue delay or undue prejudice in the adjudication of the proceeding (id.).       B.     MBTA

In its response, the MBTA notes that Cambridge has neither a constitutional nor statutory right to intervene in the proceeding and asserts that Cambridge and MECo are not similarly situated in their relationship with the MBTA because Cambridge's FERC-approved transmission rate, unlike MECo's wheeling tariff, contains no stranded cost provision (Response at 3-4). The MBTA concludes that limited participant status is sufficient for Cambridge in this proceeding

because the Department is not conducting a generic investigation of retail wheeling or formulating a general policy on stranded investment in this investigation (id. at 6, citing D.P.U. 94-102, at 4).

In support of its argument that Cambridge is not substantially and specifically affected by the outcome of the Department's investigation, the MBTA notes that Cambridge has not requested the opportunity to submit testimony or cross-examine witnesses in this proceeding (Response at 6). The MBTA concludes that Cambridge cannot assist the Department's investigation into the specifics of a relationship and dealings in which Cambridge was not involved (id. at 7). With reference to Cambridge's interest in obtaining appellate rights, the MBTA argues that if Cambridge does not put a case forward, Cambridge cannot appeal the Department's decision because it will not have demonstrated the required participation in the proceeding (id., citing Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 672 (1975) ("Save the Bay"). The MBTA asserts that granting Cambridge full party status is no guarantee that Cambridge will be allowed to appeal a final Department decision (Response at 7, citing G.L. c. 25, § 5).

#### IV. ANALYSIS AND FINDINGS

In conducting adjudicatory proceedings, the Department may



"allow any person showing that he may be substantially and specifically affected by the proceeding to intervene as a party in the whole or any portion of the proceeding, and allow any other interested person to participate by presentation of argument orally or in writing, or for any other limited purpose," as the Department may order. G.L. c. 30A, § 10, cl. (4).

Pursuant to 220 C.M.R. § 1.03(1)(b), a petition for leave to intervene in a Department proceeding must describe the manner in which the petitioner is substantially and specifically affected by the proceeding. Among other things, the petition must state the nature of the evidence the petitioner will present if the petition is granted. 220 C.M.R. § 1.03(1)(b). The presiding officer must rule on all such petitions and may grant a person leave to intervene as a party in the whole or any portion of a proceeding or may allow a person who is not a party to make limited appearance by making an oral or written statement of his position on the issue. 220 C.M.R. § 1.03(1)(e). No grant of such leave to intervene or participate shall be deemed to constitute an expression by the Department that the person allowed to participate is a party in interest, who may be aggrieved by any final decision, order or ruling, unless the grant explicitly so states. Id.

The Department has broad though not unlimited discretion to

grant or deny participation in its proceedings. Attorney General v. Department of Public Utilities, 390 Mass. 208, 216 (1983); Boston Edison Company v. Department of Public Utilities, 375 Mass. 1, at 45-46, cert. denied, 439 U.S. 921 (1978); see also Robinson v. Department of Public Utilities, 835 F.2d 19 (1st Cir. 1987). When ruling on petitions for leave to intervene in a proceeding, the presiding officer must consider the Department's procedural rules and balance the interests of the petitioner against the Department's need to conduct each proceeding in an efficient manner. See New England Telephone and Telegraph Company, D.P.U. 89-300, at 5 (1990). In Save the Bay, 366 Mass. at 672, the court expressed its concern that "the multiplicity of parties and the increased participation by persons whose rights are at best obscure will, in the absence of exact requirements as to standing, seriously erode the efficacy of the administrative process."

The Department must resolve the issue of whether Cambridge is substantially and specifically affected by this proceeding. In this proceeding, the Department is investigating the prudence of MECo's relationship with the MBTA. D.P.U. 94-102, at 3. In its Order opening the investigation, the Department stated that the investigation would focus on the unique statutory and factual circumstances of the relationship between MECo and the MBTA. Id. at 4. In addition, the

Department stated that it did not intend to establish general policy on stranded investment in this proceeding. Id. Given this background, the Department is hard-pressed to accept Cambridge's argument that it will be substantially and specifically affected by the outcome of this proceeding. Although Cambridge may ultimately be affected by methodologies developed and findings made in this proceeding, that does not equate with a substantial and specific interest in this proceeding. In fact, since Cambridge does not seek the right to conduct discovery, conduct cross-examination, or introduce evidence, if Cambridge were granted full party status, it would presumably rely on its brief to influence any final Department decision. The Department notes, however, that pursuant to the Hearing Officer Ruling denying Cambridge's petition for full party status, Cambridge has been granted limited participant status, which includes the right to file a brief. By seeking full party status, Cambridge is merely attempting to enhance its ability to appeal any final Department decision in this matter; however, as analyzed below, it is by no means certain that Cambridge would have standing to appeal any final Department decision if it were granted full party status and participated as proposed.

In its appeal, Cambridge stated that the Hearing Officer failed adequately to distinguish Cambridge from MECo and BECo. The

Department notes that BECo, Cambridge, and MECo were in a similar relationship with the MBTA when the MBTA was a retail customer of all three utilities; however, the Department finds that Cambridge and MECo are not at this time similarly situated in their relationship with the MBTA, because Cambridge's FERC-approved transmission rate, unlike MECo's wheeling tariff, contains no stranded cost provision. In addition, no proposal of Cambridge is at issue in this proceeding.

Regarding BECo, which is now the all-requirements supplier of the MBTA, in D.P.U. 94-102, at 3, the Department stated that upon submission of appropriate petitions, all intervenors in FERC Docket No. ER94-129-000 would be admitted as intervenors in D.P.U. 94-102. In accordance with D.P.U. 94-102, BECo's petition was granted on June 2, 1994. However, Cambridge is not an intervenor in the FERC proceeding. Accordingly, the Department finds that the position of Cambridge is clearly distinguishable from that of MECo and BECo.

Cambridge seeks full party status, including the right to seek judicial review of any final Department decision, but declines the opportunity to conduct discovery, conduct cross-examination, or introduce evidence. Given the limited role that Cambridge would play in the proceeding if its petition were granted, the Department finds it unlikely that Cambridge's participation as a full party would aid the

Department in its investigation. In addition, granting Cambridge the status of full party for the sole purpose of securing appellate rights would be no guarantee that such appellate rights would in fact be secured. In Save the Bay, 366 Mass. at 672, the court stated that "[o]nly where parties have demonstrated the required level of participation in the administrative proceeding and have presented an orderly record before the agency have they properly preserved their appellate rights." The Department does not find it appropriate to grant full party status to a petitioner solely for the purpose of enhancing that petitioner's ability to appeal the Department's final decision.

Therefore, based on its analysis, the Department finds that Cambridge is not substantially and specifically affected by this proceeding. After review of the submissions of Cambridge and the MBTA and other pertinent portions of the record to date in this proceeding, including the Department's Order opening this investigation, the Department finds that Cambridge's interests would be sufficiently protected by granting limited participant status to Cambridge in the proceeding.

V. ORDER

Accordingly, after due consideration, it is

ORDERED: That the Appeal of Cambridge Electric Light Company from the Hearing Officer's Ruling denying Cambridge Electric Light Company's petition for leave to intervene as a full party be and hereby is DENIED.

By Order of the Department,

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Kenneth Gordon, Chairman

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Barbara Kates-Garnick,

Commissioner

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Mary Clark Webster,

Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).